Date: 20190114

File: 566-02-8106

Citation: 2019 FPSLREB 3

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JESSICA DIKS

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Diks v. Treasury Board (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Douglas Hill, Public Service Alliance of Canada

For the Employer: Caroline Engmann, counsel

Heard at Saskatoon, Saskatchewan,

July 10 to 12, 2018.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

1 The grievor, Jessica Diks, alleged that the employer, the Correctional Service of Canada, discriminated against her on the prohibited ground of physical disability and that it failed to meet its obligations to accommodate her disability in a timely way, thus violating article 19 of the agreement between the Treasury Board and the Public Service Alliance of Canada for the Program and Administrative Services Group (all employees), which expired on June 20, 2014 ("the collective agreement").

2 The grievance was referred to the former Public Service Labour Relations Board (PSLRB) on February 12, 2013. On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace the PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

3 On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

II. Summary of the evidence

For the Grievor

4 At the time of the events that led to the grievance, the grievor was employed as a

unit parole officer at the Saskatchewan Penitentiary ("the institution"). On May 3, 2011, in a conversation with her manager, she requested to telework as a temporary accommodation for a chronic back injury, which had been aggravated by an accident unrelated to her work.

5 The grievor testified that her original back injury occurred when she was a child; it became aggravated when she slipped on ice while helping her mother move. She saw her doctor in the second week of April, who recommended that she take some time off. She took the next week off. Things improved, and she returned to work. She told her manager, Blair MacGregor, about the injury when it happened and gave him a doctor's certificate for the time off.

6 After her return to work in April, the grievor began having difficulty with her 45-minute commute. Her car had a manual transmission, and she found it difficult to operate the clutch. She could no longer drive herself to work. In addition, she was finding it difficult to tolerate sitting during the day, as her position required.

7 On May 3, 2011, the grievor forwarded a memo to Mr. MacGregor, requesting temporary accommodation in the form of telework (Exhibit 1, tab 1). On May 11, she emailed him, following up on the status of her request and requested a standing workstation (Exhibit 1, tab 3). Later, he advised her that the warden required her to resubmit and reflect the medical nature of the request, which she did on May 12, although it was dated May 3 (Exhibit 1, tab 2). The warden also requested a medical certificate to support her request, which she provided on May 25.

8 To support her request for a standing workstation, the grievor submitted a note from her physiotherapist (Exhibit 1, tab 4), which made no mention of the telework request. She testified that a telework request does not need to be supported by a medical certificate. Telework may be used as an accommodation, but it is not necessarily strictly used for accommodation purposes. On May 30, she received an email from the employer's purchasing department, along with a catalogue, asking her to select a desk (Exhibit 1, tab 6). She had still not heard anything about the telework request despite an email she had sent to her acting manager, Wanda Atwell, explaining it on May 25, 2011 (Exhibit 1, tab 5).

9 On June 10, 2011, Acting Assistant Warden, Institutional Services, Maureen Rask told the grievor that the telework request was on hold because a standing desk had been ordered for her. The grievor again followed up with Ms. Atwell, who was replacing Mr. MacGregor (Exhibit 1, tab 8). Ms. Atwell was unaware that the request was on hold. The grievor then went to her union representative, Darcy McCurdy, who investigated the situation.

10 On June 13, Ms. McCurdy emailed the grievor and advised her that the accommodation had been approved. The Union Representative could not understand why she had not been advised or why it had not been implemented (Exhibit 1, tab 9), even though it had been approved. As it turned out, the institution's warden had approved the grievor's telework request on May 12, but she had not been copied on the approval. Even though it had been approved on May 12, things did not get underway to set it up until June 13, and even then, things were not in place until the end of July.

11 On July 5, 2011, the grievor wrote to her local union representative, Gerald Wiegers, about how long it was taking to implement the telework, which the Warden had approved on May 12 (Exhibit 1, tab 13). She listed all the roadblocks she had encountered along the way, including that she had to apply for remote computer access, even though her telework had already been approved.

12 The telework arrangement could not be implemented until certain things were approved, including virtual private network (VPN) and SRS (a system which parole officers use to complete their work) access, which the employer's headquarters had to approve. The grievor also required a special filing cabinet, and a threat-risk assessment of her home had to be done, which was scheduled for July 7, 2011.

13 The grievor did not know how long it would take to get remote access to the employer's computer resources when she made her accommodation request in May. She was aware that telework took many levels of approval and that it would not happen in one day. Her job also required her to access the hard copies of files, which she would do in the office. That is why she brought up the idea of a standing workstation to possibly bridge the gap until the telework was in place. She knew that getting a laptop computer would also take some time, more than a day or two.

14 The grievor did not recall having discussions with Mr. MacGregor in April during which, according to his testimony at the hearing, he told her that a medical accommodation could take a lengthy period to set up. He asked her to change her initial request from one for telework to one for accommodation, but he did not help draft it other than telling her that it had to be made very clear that she was requesting telework for medical reasons. She also did not recall an offer to change her work to intake duties, which would have better suited her restrictions.

15 On July 6, the grievor's doctor put her off work from July 7 until August 8, 2011. The threat-risk and ergonomic assessments of her workstation and her home workspace occurred on July 7. Mr. MacGregor delivered the filing cabinet that day and was present for the assessments. She gave him the medical certificate then and discussed with him the possibility of teleworking full-time rather than taking time off.

16 Despite the exchange of several emails and conversations with management, an ergonomic assessment was not requested until June 26, 2011, 44 days after the accommodation request was made; it was not completed until July 7.

17 Further delays implementing the accommodation request resulted in the grievor taking sick leave from July 7 to September 19, 2011. When she returned to work, the workplace accommodations were in place.

18 The grievor seeks the reimbursement of the sick leave she was required to use because the employer unnecessarily delayed implementing the accommodation.

19 Once the employer received the ergonomic assessment report and all the necessary equipment was in place for the telework to begin, it required the grievor to provide a doctor's certificate approving her to return to work and stipulating her restrictions (Exhibit 1, tab 17). The telework and new workstation were poised and waiting on the medical note, according to Mr. MacGregor.

20 The grievor was aware that the employer required a medical certificate to justify her accommodation. Her physiotherapist was unwilling or unable to provide her with one in a timely fashion. Initially, she thought she would receive it before the end of her visit on May 8, but it did not happen. Eventually, she provided it on May 25. The

employer attributed delays in the accommodation process to the approval process and to waiting for the medical note. The grievor disagreed, as qualifying for telework did not require a medical note, so the delay had to have been in the approval process. She testified that Mr. MacGregor never told her to set up an ergonomic assessment or that the equipment she needed was available on June 14.

21 As the accommodation measures were not yet implemented, the grievor's doctor put her on sick leave between July 7 and August 8, 2011. She did not have enough leave credits to cover the entire period; she was 3.5 days short. She was unaware that her manager had filled out long-term disability insurance forms for her.

22 Despite being on sick leave, the grievor went to the institution on July 18 to pick up her laptop. Had she not done so, her password for the VPN would have expired, which would have caused more delays while she waited for it to be reset. While she was there, she had an impromptu meeting with Mr. MacGregor, and without her union representative, to discuss her medical situation and telework. He agreed to propose full-time telework for her once he received the report of the ergonomic assessment performed on July 7.

23 The approval came quickly after that meeting. The grievor then teleworked for approximately 10 working days, until about August 12, but encountered technical difficulties because of the speed of the Internet connection at her location. She brought her computer into the institution to be serviced and in the meantime, carried on her duties via phone. She found out that she needed a special Internet connection for VPN service and that only a limited number of them were available through her Internet provider. She explained this to her employer in an email on July 26, 2011 (Exhibit 3, page 80).

24 On August 11, 2011, the grievor advised her employer that since she could not telework, her doctor would not support any type of return to work, so she would have to revert to sick leave until the doctor agreed to allow her to commence a gradual return to work or her Internet connection issues were resolved and she could recommence teleworking. The employer advanced her 187.5 hours of sick leave on August 25, 2011. She remained off work until September 19. On September 20, 2011,

she commenced a gradual return to work.

Blair MacGregor's evidence

25 Mr. MacGregor was the manager of interventions, Unit 1, at the institution in May 2011. He was responsible for among other things managing the parole officers, including the grievor.

26 The parole officers each carried a caseload of 25 inmates at the time. They managed their correctional plans and programs, prepared them for release, arranged for their escorted temporary absences, carried out case planning, and prepared recommendation reports for the warden and the parole board. Parole officers had to meet with inmates regularly and hold case conferences, which occurred primarily in their offices or in the boardroom at the parole office at the institution. Parole officers were obligated to meet weekly with inmates in segregation. Occasionally, a parole officer might have had to meet with an inmate on the range inside the institution.

27 Intake parole officers were allowed to work from home, while unit parole officers, such as the grievor, were not. Intake parole officers interviewed inmates once. They did more report writing than their colleagues did and did not carry a caseload. Every five days, a new inmate was added who had to be interviewed.

28 Mr. MacGregor testified that the grievor was on sick leave in April 2011 due to a back injury. He received her request to telework because of her injury on May 3, 2011 (Exhibit 3, tab 1), but they had discussed the options available to her before then. The options were limited to telework, changing to intake work, or medical or disability leave. He spoke to his labour relations representative and the Warden about the request. He wanted the grievor at work and wanted to support her request.

29 On the advice of the employer's Labour Relations branch, the Warden insisted that the grievor provide a medical note to support her request because no unit parole officers had been allowed to telework. The Warden was not interested in allowing them to telework but was willing to consider it in the grievor's case if the medical information supported her request. Mr. MacGregor then told her that for her request to be approved, she would have to resubmit it and stress its medical aspect, to keep the

floodgates closed. The grievor then resubmitted her request, but it was dated the same as the original request (Exhibit 3, page 3). The second memo was received on May 12, 2011. Mr. MacGregor immediately began getting organized to get it approved.

30 On May 11, Mr. MacGregor received an email from the grievor, in which she asked about the status of her request. She proposed that if telework would not be approved or that if the approval would take weeks or months, they explore other options (Exhibit 3, page 5). Mr. MacGregor testified that the email made it look like the grievor did not know what was going on, but he had discussed the process with her when she was working on the unit. They had discussed other options, including moving her to intake duties, long-term disability insurance, employee assistance services, a modified work routine, and an accommodation. All through their interactions, he had been supportive of telework for medical reasons but its approval would take time, which he had told her.

31 When the grievor asked for a standing workstation, Mr. MacGregor asked for an ergonomic assessment of her worksite. He asked his purchasing manager to find a suitable desk for her based on that assessment. Initially, he thought that someone on staff could carry out the assessment, but later, on about May 25, he discovered that a certified ergonomist was required and that the person on staff was not certified. So, the employer had to find someone qualified and available.

32 On May 12, 2011, the grievor gave Mr. MacGregor a proposal for a temporary accommodation, which he sent to Labour Relations, asking for advice. The Labour Relations Advisor told him that the accommodation required a note confirming the medical need. Once that was provided, a written telework agreement would be required, as well as approval for remote computer access, a threat-risk assessment of the grievor's home, and an ergonomic assessment of her home workspace. Mr. MacGregor did not recall if he told the grievor about these requirements; however, this information was available in the employer's "Telework Policy" ("the policy") on its intranet.

33 The employer received the medical certificate on May 25, 2011 (Exhibit 3, page 23). With it, Mr. MacGregor authorized the standing desk purchase. It was also

sufficient for telework. He organized the threat-risk assessment and the ergonomic assessment of the grievor's home. However, on that same day, he changed jobs; Ms. Atwell replaced him. She was aware of the situation and worked with the same labour relations advisor to conclude it. About the same time, the Assistant Warden, Intervention, with whom Mr. MacGregor had been working, also left her job. She was replaced by Ms. Rask, who had not been briefed on the situation.

34 The grievor followed up regularly as to the status of her request, as needed. Even though he had changed jobs, Mr. MacGregor continued to lead the process, so he stayed updated on the progress. When he received an email from Ms. Atwell on June 10 stating that it was likely that the grievor would go on sick leave because of the delays implementing her accommodation (Exhibit 3, page 36), a sense of urgency arose for him. He had to get someone involved, to complete the paperwork. He spoke to the Information Technology (IT) branch. It referred him to someone outside the institution, who sent the forms to be filled out. Mr. MacGregor did so and sent them for approval. He spoke to Tim Hogan, a union representative in the workplace, about the grievor's case, to keep the union aware of the progress.

35 On June 13, 2011, Mr. MacGregor sent a request to IT at the institution, advising it that the Warden had approved the grievor's telework arrangement and that things needed to be done on an urgent basis (Exhibit 3, page 42). The next day, he emailed the grievor, confirming that her telework had been approved and making sure there was no confusion. However, more delays came up when the ergonomic assessor required a security check, which was done only once per month and by only one person. As a result, the ergonomic assessment of the worksite and of the grievor's home was done only on July 7, along with the threat-risk assessment.

36 The only thing left was having remote access approved, which could be done only once the threat-risk assessment had been completed. The ergonomic assessment results were received on July 18. Between July 7 and 18, Mr. MacGregor spoke with the grievor several times by phone. She came into the office on July 18 and met with him. They dealt with her IT issues and reviewed the ergonomic assessments. She advised him that she required telework 100% of the time. He responded that if that were so, she had to provide an updated medical note stating as much. He summarized

their meeting in an email to the Warden (Exhibit 3, page 71).

37 Mr. MacGregor's goal was to have the grievor begin teleworking on July 22. On July 20, he emailed her, asking if she had secured the doctor's note allowing her to return to work (at that point, she was off work completely). He also took the opportunity to remind her that her sick leave would run out on July 31 (Exhibit 3, page 77). He received the doctor's note, which stated that the grievor was not fit to commute but was fit to telework (Exhibit 3, page 81). Everything was in place to start on July 22, but the grievor could not get her computer to work because of her Internet connection. Ms. Atwell told her that she would have to carry out consultations by phone until the Internet issue was resolved and that in the meantime, the grievor was to check-in daily with her.

38 On August 11, the grievor's return to work ended, and she went on sick leave again. Mr. MacGregor agreed to advance her 187.5 hours of sick leave because her bank would run out in about a week. He again raised the possibility of intake work, which had always been on the table as a possibility. On September 2, her sick leave was extended until September 19 (Exhibit 3, page 84). Even then, she was unable to resolve her Internet issues.

39 Mr. MacGregor spoke to the local union representatives about the grievor's file several times during the summer of 2011. They were concerned about how long it was taking to resolve things. When he reviewed it with them and explained what had happened, they agreed that the employer had met its obligations. Some communications failures might have arisen between managers because of acting assignments, but the file never sat still; it always moved forward.

40 Typically, it takes at least one month to implement telework. This case was very complicated because of the medical situation requiring ergonomic assessments of two locations and involving physiotherapists and doctors. Waiting for the ergonomic assessments created a lengthy delay as the employer did not have anyone qualified on-site. It had to find someone and put that person through the security clearance process before he or she could access the worksite.

41 The grievor wanted to work and was cooperative but frustrated. She was

not happy that the process was taking so long, and she was in pain.

Kathy Neil's evidence

42 Kathy Neil was the institution's deputy warden in 2011. She was aware of the grievor's accommodation request and became involved in September 2011, when she was the acting warden. Mr. Wiegers spoke to her on the grievor's behalf. He asked to review the employer's file, particularly on the timeliness of the intervention. Ms. Neil met with him and a representative from the Human Resources branch, and reviewed the file with him; he did not indicate any concerns. To follow up, Ms. Neil sent a memo to the grievor confirming that she had met with Mr. Wiegers, that he had reviewed her file, that the union was satisfied that the process had been handled in a timely fashion, and that none of her sick leave would be reimbursed (Exhibit 3, page 86). She copied Mr. Wiegers. She received no response from either him or the grievor.

43 According to Ms. Neil, telework requests are approved based on operational requirements. Telework arrangements for unit parole officers are extremely rare because the employer prefers to have them in the workplace. Those parole officers who wish to telework generally switch to intake work. If a unit parole officer requests telework, a medical certificate is required, and the request is handled as a duty to accommodate and not under the policy. If a unit parole officer requests telework without a medical certificate, it is unlikely to be approved.

III. Summary of the arguments

A. For the grievor

44 The issues are set out in the grievance (Exhibit 1, tab 22). They are that the employer discriminated against the grievor by failing to accommodate her in a timely fashion. The existence of her disability is uncontested (Exhibit 1, tab 4, and Exhibit 3, page 81). She suffered from a back injury for which she required accommodation. Article 19 of the collective agreement stipulates that there will be no discrimination on the basis of mental or physical disability.

45 The evidence is not in dispute. Its chronology is set out in Exhibit 1, tab 20. Eight events occurred, the seven listed in the chronology plus the request for a

certified ergonomist to carry out the ergonomic assessment, which request was made on June 26, 2011. The question is whether the eight events occurred in a timely fashion.

46 Delays occurred for many reasons. The grievor conceded that the delays obtaining the ergonomic report were reasonable. The request for an ergonomist was made on June 26. The assessment occurred on July 7, and the report was received on July 18, which was a completely reasonable turnaround. However, the rest of the delays caused by the employer's action or often its inaction adversely affected the grievor and forced her to use sick leave when in the alternative, had the accommodation been in place, she could have worked.

47 In the case of *Lloyd v. Canada Revenue Agency*, 2009 PSLRB 15, the PSLRB dealt with a similar situation. That employee had also suffered a back injury, and the employer delayed for 36 days requesting an ergonomic assessment. Once it was received, the employer did not implement its recommendations in what the PSLRB considered a reasonable time. It awarded the grievor in that case $6000 in damages.

48 Like the employer in the *Lloyd* case, Mr. MacGregor did not pursue the ergonomic assessment in a timely fashion. Rather than waiting until June 26, he should have requested it on May 12, when he received the grievor's initial request.

49 The *Lloyd* case, at paragraph 41, also sets out the guiding principles for assessing whether a delay implementing an accommodation was reasonable.

50 The procedural aspect of the duty to accommodate requires the employer to obtain all relevant information about the grievor's disability, according to the PSLRB in *Panacci v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 2 at para. 86. The first medical certificate that the grievor provided never mentioned the telework requirement, but the employer accepted it as sufficient to agree that telework was the required accommodation, based on the grievor's request.

51 In *Cyr v. Treasury Board (Department of Human Resources and Skills Development)*, 2011 PSLRB 35 at para. 50, the PSLRB stated that the duty to accommodate includes procedural aspects that require the employer to make sustained and prolonged efforts to accommodate a grievor. The grievor's first request was met

with the negative response that a blanket practice was in place not to accommodate unit parole officers via telework without a medical certificate. According to *Cyr*, this was reckless conduct.

52 The original telework request clearly stated that it was for a medical accommodation. After consulting the Warden, Mr. MacGregor asked the grievor to change the heading to state that it was a medical accommodation and to resubmit her request. The accommodation request was approved on May 11 or 12, which was within seven business days. The next delay was caused by the requirement to complete a medical report to support the request, which had been possible only on May 25. The longest delay was in requesting the ergonomic assessment, which was approximately 23 business days. If it had not been delayed, perhaps the grievor would not have had to use sick leave.

53 The parties recognize that some delays are acceptable in an accommodation process. However, some are not, such as in this case, when the grievor took 7 days to resubmit her request, when it could have been amended the same day, and taking 23 days to request an ergonomic report when it could have been requested the day on which telework was approved.

54 The grievor met the burden of proof and showed that unreasonable delays occurred through negligence on the part of Mr. MacGregor. His reckless behaviour in having an uncertified person assess her workspace caused an unnecessary delay.

55 The grievor asked that the grievance be allowed, that she be reimbursed 14 days of sick leave, and that she be granted $5000 in damages for pain and suffering.

B. <u>For the employer</u>

56 The employer's position is that the grievor failed to establish that she suffered from a disability. There is a difference between an injury or illness requiring an adjustment to a work schedule and a disability (see *Gibson v. Treasury Board (Department of Health)*, 2008 PSLRB 68). The parties have used the term "disability" very loosely in this context, but it has a specific legal meaning.

57 The grievor had to put forward clear, cogent, and convincing evidence,

including medical evidence, of her disability, which means more than a medical note. The first medical note that the employer received did not refer to telework or to a disability. The second one did, but only after the grievor was told that the employer needed that reference to proceed with telework.

58 If the disability did exist, the employer's position was that there was no delay implementing the accommodation. The grievor did not point to any of the employer's actions as being discriminatory or as negatively impacting her. The moment she approached Mr. MacGregor, he consulted management and suggested a medical accommodation.

59 In *Ontario Public Service Employees Union (Alviani) v. Ontario (Revenue)*, 2011 CanLII 10252 (ON GSB), the employee in that case required an ergonomic assessment, which the employer said it would look into. The delay in that case was due in part to the employer's indifference or fault, which constituted a failure to comply with its duty to accommodate. However, there was no medical evidence that the difficulties the employee was encountering at work were caused by her workstation until much later in the process. At paragraph 43, the Arbitrator recognized that procurement in the public service causes delays and is time consuming. The delay in *Alviani* was 16 weeks. In this case, it was one month, from May 25 to June 26.

60 Whether the time taken can be considered unreasonable must necessarily depend on the facts of each case, including the nature of the employee's disability, the duties and responsibilities of his or her position, the nature and timing of the medical information as to the restrictions resulting from the disability as provided to the employer, the information as to whether suitable accommodation is readily available, considering the nature of the employer's operation, the level of cooperation and participation on the part of the employee and his or her union in the accommodation effort, and the sophistication and experience of the employer with accommodation issues (see *Alviani*, at para. 34, and *Lloyd*, at para. 41).

61 It is eminently unfair to make comments about Mr. MacGregor being reckless or negligent since it was never put to him in examination. The rule in *Browne v. Dunn* (1894), 6 R. 67 (H.L.), applies to substantive arguments such as this because of

the damages claim. The evidence provided on why it took more time to retain an occupational therapist for the ergonomic assessment was that the employer needed to find someone qualified, available, and willing to enter the institution. The employer had never been in this situation before; it had always relied on the resources of the Workers' Compensation Board or the long-term disability insurance carrier. The Board has a reasonable explanation for the delay, which was not inordinate.

62 The Arbitrator in *Ontario Public Service Employees Union v. Ontario (Ministry of Labour)*, [2012] O.G.S.B.A. No. 126 (QL) ("*Fenech*"), adopted the reasoning in *Alviani* (see paragraph 243). The reasonableness of the timeliness to implement an accommodation depends on the facts of each case.

63 In this case, the evidence is that the grievor began discussions in April 2011 with Mr. MacGregor about difficulties from her back injury. He advised her then that an accommodation would take some time to implement (Exhibit 3, page 26). By the time she requested the accommodation in May, she was aware that it would take some time to implement. Her initial request was clear that she wished to telework for medical reasons; she did not initially request an accommodation.

64 The employer identified the need for an accommodation and being prudent, requested that she resubmit her request as a medical accommodation (Exhibit 3, page 1). Mr. MacGregor reviewed the initial request and discussed it with the Warden, who requested that it be resubmitted as a medical accommodation request based on operational requirements. Unit parole officers, of whom the grievor was one, are normally required to work at the institution. If they want to telework, normally, they are required to transfer and to take on the intake role.

65 The grievor resubmitted her request by May 12, and the Warden approved it that day without a medical certificate (Exhibit 3, page 18). However, the employer asked her to provide a medical note identifying her restrictions, which would trigger the requisitions and other things required to implement telework. According to *Alviani*, the process begins with a medical note, which the grievor provided eight business days after the employer asked for it. By May 17, the wheels were in motion to implement

telework and to provide her with an elevated workstation, as she had requested, by May 27 (Exhibit 3, page 32).

66 Even though Mr. MacGregor moved into some acting positions, he remained the point of contact throughout. Many things happened in June 2011. He found someone to carry out the ergonomic assessment, he worked with IT to get the equipment required for the grievor's home and to complete the threat-risk assessment of it, and he worked with the proper authorities at the employer's headquarters to effect the remote access. Despite the Assistant Warden, Operations, telling Ms. Atwell that telework was on hold, it was clear that she knew it had been approved and that the employer was working on implementing it.

67 The institution's management communicated regularly with the grievor and among itself about the status of the telework. On June 10, the standing workstation was ordered. On June 13, the laptop was available, but the grievor needed to complete forms to have remote access approved. Mr. MacGregor was sent the forms and directions on what the grievor had to do with them to obtain remote access. Once she received them, she had to attend a 30-minute appointment with IT to be set up on the laptop (Exhibit 3, page 38).

68 That same day, the union was advised that the grievor had been approved for telework as a medical accommodation (Exhibit 3, page 40). Again on June 13, Ms. Atwell contacted the grievor to arrange the threat-risk assessment (Exhibit 3, page 41). Meanwhile, Mr. MacGregor searched for someone to carry out the ergonomic assessment. On June 21, the grievor contacted him to arrange the threat-risk assessment (Exhibit 3, page 50). Both assessments occurred on July 7. The employer had the reports by July 18, and everything was in place on that date to start teleworking.

69 The grievor's doctor put her on sick leave for July 7 to 21. She attempted to telework between July 25 and August 12, which her doctor had approved on July 19 (Exhibit 3, page 81). It proved impossible through no fault of the grievor or the employer. The Internet connection in her area was too slow to allow the VPN to function properly; she could not connect to the workplace. She reverted to sick leave effective August 15 and remained on it until September 19, 2011.

70 To calculate the days it took to implement the accommodation, seven days in May are relevant, although it is not clear when the accommodation request was filed. In reality, it was only three or four days; the rest only involved discussions with the Warden. The second delay was finding an occupational therapist to conduct the ergonomic assessment.

71 The employer approached this case as a duty to accommodate, regardless of the fact that it was under the auspices of the telework policy. However, the policy required only equipment and an electronic network. Much more was required to accommodate the grievor; telework was only one part of it. Every case must be decided on its merits.

72 The employer's efforts are clear, yet at the end of the day, the grievor's Internet connection prevented her from teleworking. Once the Internet issue was resolved, she had returned to her position at the institution. The employer is prudent; it ensured that her worksites met her needs and physical limitations.

73 As to the grievor's demand for the reimbursement of 14 days of sick leave, there is no evidence as to how many of those days might have been attributable to her disability and how many to the employer's delay. In such a case, sick leave is not reimbursed (see *Lloyd*, at para. 50). The collective agreement is clear at clause 35.05 as to when it is reimbursed, which is when injury-on-duty leave is granted. That was not done in this case. The collective agreement has no provision that reimburses sick leave. Under s. 209 of the *Act*, the Board is prohibited from issuing any decision that would require changing a collective agreement.

74 As to the question of damages, no evidence supports such a request. The request for damages and this grievance should be dismissed.

IV. Reasons

75 The grievor has alleged that the employer discriminated against her based on her disability, in violation of article 19 of the collective agreement, which provides that there shall be no discrimination exercised or practiced with respect to an employee by reason of physical disability, amongst other grounds, as follows:

ARTICLE 19

NO DISCRIMINATION

> *19.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or conviction for which a pardon has been granted.…*

76 In order to demonstrate that an employer engaged in a discriminatory practice, a grievor must first establish a *prima facie* case of discrimination. A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the grievor's favour in the absence of an answer from the respondent (*Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 28 ("*O'Malley*")).

77 An employer faced with a *prima facie* case can avoid an adverse finding by calling evidence to provide a reasonable explanation that shows its actions were in fact not discriminatory; or, by establishing a statutory defence that justifies the discrimination (*A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at para. 13).

78 In the present case, I find that the employer has presented a reasonable explanation to rebut any *prima facie* case of discrimination established by the grievor. Her claim is therefore not substantiated.

79 The grievor's case is built on the assumption that she has a disability. The employer's counsel argued that a distinction is to be made between an injury and a disability. For those injuries with no lingering or long-lasting effects, sick leave may be appropriate if the employee is unable to work and will be away from the workplace. Others may have lingering, long-lasting, or chronic effects, which may require changing or modifying the employee's workplace and work arrangements, either temporarily or permanently.

80 The grievor's situation is in fact a hybrid. Until she aggravated her pre-existing injury in April 2011, she had not needed changes to her workplace or work arrangements. As such, her health status did not impede her ability to work. With the aggravation of her injury, the demands of daily commuting made it such that she needed to find alternate work arrangements. She explored them with her employer beginning in April 2011, and for all intents and purposes, she and the employer considered that they were dealing with a disability. I find it disingenuous that the employer argued that she did not have a disability because she provided it with the medical information it requested in the format it requested.

81 Accordingly, applying the *O'Malley* test, the complainant's evidence would show on a *prima facie* basis that she was disabled and that for a period of time, in the absence of the necessary accommodation measures, she was prevented from working due to her disability. This meant that she either had to go to work while still enduring the pain caused from the aggravated injury or use her sick leave days.

82 However, I find that the employer has provided a reasonable and persuasive answer to the grievor's case, namely that it did in fact accommodate the complainant's needs and that any delay that may have occurred in the implementation of the accommodation was reasonable in the circumstances.

83 The delay in implementing the grievor's requested accommodation is difficult to calculate. Both parties agree the first delay occurred between May 3, when the grievor submitted her first written request, and when she was asked to resubmit it, on May 11. The other delay was finding an occupational therapist, which the grievor's representative argued should be calculated from May 12, while the employer's representative argued that it should be calculated from May 25.

84 Instead of looking at it that way, I prefer to look at it as a global process. In my opinion, it is impossible to look at the parts of an accommodation and consider them a delay when the process continues to move forward, as was so in this case. Had any of the delays stopped the process or prevented it from moving forward, as in *Lloyd*, *Alviani*, and the other cases cited, my opinion might be different. The only time the process stopped was when the employer was ready to carry out the threat-risk

assessment but chose to wait and carry it out at the same time as the ergonomic assessment. By my calculation, that was 10 working days.

85 The employer is entitled to a reasonable time to accommodate an employee (see paragraph 17 of *Alviani*). That reasonableness depends on the facts of each case (see *Fenech*, at para. 234). The process began with the grievor's medical note, provided eight business days after the employer asked for it. The grievor provided it on May 25, yet on May 17, the employer already had the wheels in motion and was working on implementing telework without the benefit of the note. The total time the employer took from receiving the medical information was 38 working days.

86 During the early discussions, the grievor was advised that the process would take time. No doubt, she was anxious to have everything in place so that she could limit her commuting, but no evidence before me shows that things could have been done quicker, that they were unduly delayed, that her requests were ignored, or that the employer had any intention to deny her request. In these circumstances, 38 working days was not unreasonable, given all the moving parts and all the resources that had to be marshalled to implement telework. There were hiccups along the way, which were caused primarily by a number of acting appointments, but their impact was mostly on communicating with the grievor and not with approving and implementing telework.

87 Mr. MacGregor was the constant throughout the implementation process. It is clear from his correspondence that he wanted telework implemented urgently (Exhibits 3, 8, and 42). His ignorance of what the internal ergonomic assessor could do was the cause for the delay in having the ergonomic assessment completed, but as I have stated, this was only one part of an entire process, which did not prevent the rest of the process from continuing.

88 I do not agree that Mr. MacGregor's conduct was negligent or reckless. The fact that he was unfamiliar with the internal ergonomic assessor's role was clarified, and the proper professional was recruited to carry out the assessment. No significant delay was encountered. The grievor was never in any danger as a result of Mr. MacGregor's ignorance of the difference between the roles of the internal assessor and

an occupational therapist.

89 Nor do I find that Mr. MacGregor was reckless in informing the grievor that operational requirements precluded unit parole officers from teleworking. The grievor's representative made a statement that a blanket practice was in place not to accommodate telework. I believe that this is a misstatement of the facts. Rather, a blanket practice was in place not to allow telework except if it was required for medical reasons and as an accommodation, which is why the Warden asked the grievor to reword her request, stressing that it was for medical reasons. The Warden then approved her request on the basis of the medical need.

90 Considering all the factors set out at paragraph 41 of *Lloyd*, and considering that there were no indications that the employer did not intend to implement the accommodation, that it wished to unreasonably delay its interpretation, or that it was another situation similar to those in the case law cited, I conclude that the employer has not breached article 19 of the collective agreement in implementing the necessary accommodation. The delay was reasonably necessary given the circumstances. I remind the grievor that her union representatives reached this same conclusion when they reviewed the process in 2011 (Exhibit 3, page 86).

91 For all of the above reasons, the Board makes the following order:

Order

92 The grievance is dismissed.

January 14, 2019.

Margaret T.A. Shannon,
a panel of the Federal Public Sector Labour Relations and Employment Board